In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 10.

MABEL GILLESPIE,
Administratrix of the Estate of Daniel E. Gillespie,
Deceased,
Petitioner,

vs.

UNITED STATES STEEL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RESPONDENT'S MEMORANDUM CONCERNING REVIEWABLE FINALITY OF JUDGMENT UNDER REVIEW.

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This memorandum is filed by Respondent in response to the Court's request that counsel discuss the question whether the record presents a reviewable final judgment.

I. RESPONDENT MOVED TO DISMISS APPEAL BELOW FOR WANT OF FINAL ORDER BUT WAS OVERRULED.

This Jones Act case, brought by the administratrix of a Great Lakes seaman, is here on certiorari to review the decision of Judge Jones in the Northern District of Ohio, affirmed by the Sixth Circuit, in which both courts below (R. 15-16):

1. Struck claims based on the Ohio Wrongful Death Act on the ground the Jones Act and this Court's cases leave no room for the operation of state-provided remedies in seamen's cases, and

2. Struck claims asserted on behalf of a brother and three sisters on the ground the federal statute and this Court's cases bar claims of remote beneficiaries where, as here, a beneficiary of an earlier class (the mother) survives.

3. Struck claims of pain and suffering prior to death on the ground this Court's cases bar such claims where, as here, no appreciable interval separates accident and death.

The matter came to the Court of Appeals on the appeal of the administratrix and on her petition under the "All Writs" Act. (R. 16, 18-23.) The court below consolidated the actions. (R. 25.) Respondent moved to dismiss the appeal for want of a final reviewable order. (R. 17.) The Court of Appeals (Judges McAllister, Weick and O'Sullivan), upon an analysis of the nature of the order (R. 32-34) considered the question (R. 33) "a close one" but concluded a reviewable judgment was presented. The Court of Appeals so ruled on the ground interim orders have been ijudged reviewable under special circumstances of the kind the court deemed here present. (R. 33.)

In resisting certiorari, Respondent urged that a reviewable order was not presented. Now, however—

II. CERTIORARI HAVING BEEN GRANTED, AND ISSUES BRIEFED AND ARGUED, DOUBTS CONCERNING REVIEWABILITY SHOULD BE RESOLVED IN FAVOR OF REVIEW.

Strong policy considerations counsel rejection of interim orders tendered for review. Now, however, the case having been accepted for review here and having been briefed and fully argued, additional considerations come into play. These considerations, it is believed, suggest the wisdom of deciding the case on its merits, especially where the issue of reviewability, as the court below concluded, is close.

1. Policy Considerations Favor Decision of Case on Merits.

Two important considerations weigh in favor of decision now:

1. *The grant of certiorari has put a cloud* on the admiralty rule deemed settled for 34 years and stirs disturbing problems in the wider railway field governed by the same federal statute where a half century of decisions says the statute leaves no room for state-provided remedies. The question is obviously an important one. It should not be left in doubt. If the Court now dismisses the appeal without decision, the law in these areas will be in turmoil until the Court can speak. In the meantime the rights of many will be sacrificed on the turn of counsel's guess and many suits will be filed that otherwise would not be (to protect against a turn in the law). This is not a desirable result.

2. *The doctrine of conservation of judicial energies* counsels decision now. It is, no doubt, this very doctrine that supports the refusal of courts to review interim orders.

Here, however, refusal to decide will make work—not reduce it. For until the issue is settled by this Court, fresh problems and suits will beset courts, lawyers and suitors.

2. Case Law Makes Interim Decisions Reviewable in Special Circumstances.

The rule barring piecemeal review is well settled. Many cases would support dismissal of the appeal for want of a final order:

Lewis v. E. I. du Pont de Nemours & Co., Inc. (5 C. A., 1950), 183 F. 2d 29;

Hohorst v. Hamburg-American Packet Company (1893), 148 U. S. 262;

Stewart v. Shanahan (8 C. A., 1960), 277 F. 2d 233;

Chadbourn Gotham, Inc. v. Vogue Manufacturing Corporation (4 C. A., 1958), 259 F. 2d 909;

Thompson v. United States (4 C. A., 1957), 250 F. 2d 43;

United States Sugar Corp. v. Atlantic Coast Line Railroad Company (5 C. A., 1952), 196 F. 2d 1015;

Clinton Foods, Inc. v. United States (4 C. A., 1951), 188 F. 2d 289;

Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corporation (2 C. A., 1946), 154 F. 2d 814, certiorari denied (1946), 328 U. S. 859;

Shultz v. Manufacturers and Traders Trust Co. (2 C. A., 1939), 103 F. 2d 771;

Cox v. Graves, Knight & Graves, Inc. (4 C. A., 1932), 55 F. 2d 217;

Markham v. Kasper (7 C. A., 1945), 152 F. 2d 270;

Harvey Aluminum v. Industrial Longshoremen's and Warehousemen's Union (9 C. A., 1960), 278 F. 2d 63.

However, the rule of finality for purposes of appellate review is by no means easy of application. As Mr. Justice Jackson observed, in *Dickinson v. Petroleum Conversion Corp.* (1950), 338 U. S. 507, the courts have struggled (p. 511):

> "sometimes to devise a formula that will encompass all situations and at other times to take hardship cases out from under the rigidity of previous declarations; sometimes choosing one and sometimes another of the considerations that always compete in the question of appealability, the most important of which are the inconveniences and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."

Thus, review has been granted in many situations where the order under challenge did not in fact terminate the litigation and was not in any real sense final. Illustration may be found in cases where the Court has reviewed orders involving issues, decision of which was deemed fundamental to the further conduct of the case, as, for example, in:

Land v. Dollar (1947), 330 U. S. 731, where, although the case still awaited trial, this Court held the challenged decision reviewable for the reason thus summarized by Mr. Justice Douglas (p. 734, Note 2): "Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue 'fundamental to the further conduct of the case.' "

United States v. General Motors Corp. (1945), 323 U. S. 373, where this Court reviewed rulings on evidence notwithstanding the case had been remanded for a new trial. The Court observed, in an opinion by Mr. Justice Roberts (p. 377): "We think we should review that ruling inasmuch as

it is fundamental to the further conduct of the case."

The same principle would seem to apply here. Claims and parties have been eliminated under circumstances where, no matter what the result upon a new trial, a fresh appeal will follow unless—as seems unlikely—petitioner will be content to abandon claims petitioner has thus far carried all the way to this Court.

The question of finality for purposes of review arises in every case where the cause has been remanded for a new trial. However, in such cases where the question involved has been deemed sufficiently "important" the Court has ruled the order reviewable. *Larson v. Domestic and Foreign Commerce Corp.* (1949), 337 U. S. 682, 685, Note 3; *Forsyth v. Hammond* (1897), 166 U. S. 506, 513.

Similarly, the Court under special circumstances has held reviewable the denial of leave to proceed in forma pauperis, *Roberts v. United States District Court for the Northern District of California* (1950), 339 U. S. 844, and ruling on a temporary injunction, *Hanover Star Milling Company v. Metcalf* (1916), 240 U. S. 403, 409 "notwithstanding the general rule to the contrary."

The Court also has deemed reviewable orders otherwise not strictly final where they turned on a severable claim. *Cohen v. Beneficial Industrial Loan Corp.* (1949), 337 U. S. 541, 546; *Swift & Company Packers v. Compania Colombiana del Caribe, S. A.* (1950), 339 U. S. 684, 689; *Stack v. Boyle* (1951), 342 U. S. 1, 6.

Albeit the Court's power to take such cases is not lightly to be exercised, once the case is here, and fully briefed and argued, strong policy considerations, as in this case, may well favor decision of the questions raised.

CONCLUSION.

For the reasons stated, the Court can and, it is believed, should decide the case on the merits.

Respectfully submitted,

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